

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAMON REYES

Claimant

VS.

CENTIMARK CORPORATION

Respondent

AND

AMERICAN CENTURY CO.

Insurance Carrier

Docket No. 1,007,295

ORDER

Respondent and Claimant requested review of the January 23, 2009 Review and Modification Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on May 15, 2009.

APPEARANCES

John G. O'Connor, of Kansas City, Kansas, appeared for the claimant. Timothy G. Lutz, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties confirmed that claimant has not sustained any increased functional impairment. Rather, he claims that he is permanently and totally disabled or, in the alternative, has sustained a permanent partial general (work) disability as found by the ALJ.

ISSUES

This is an appeal from a review and modification proceeding. Although the claimant alleged he was permanently and totally disabled pursuant to K.S.A. 44-510c, the ALJ denied this aspect of claimant's claim. The ALJ did conclude claimant had established the requisite change in his condition and awarded a 62.88 percent work disability based upon a 61.75 percent task loss and a 64 percent wage loss. This work disability commenced as of August 18, 2006, the date claimant's employment was terminated. Both parties have appealed this Award.

Respondent concurs with the ALJ's conclusion that claimant is not permanently and totally disabled and asks that that portion of the Award be affirmed. However, respondent contends the balance of the Award should be reversed. Respondent maintains that claimant failed to make a good faith effort to retain his employment when respondent provided accommodated work to claimant. Thus, he is not entitled to a work disability award.

Claimant requests review of that portion of the Award that denied him permanent total disability under K.S.A. 44-510c. Claimant contends he is realistically unemployable given his permanent work restrictions, his limited work and educational history as well as his limited language skills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out the facts and circumstances of this claim in some detail and the Board finds those facts are accurate and supported by the record. For this reason, the ALJ's recitation of the facts is adopted.

This appeal stems from claimant's request for a review and modification of an earlier agreed award entered into by the parties on October 4, 2004. In that award, the parties settled claimant's claim based upon a 25 percent permanent partial impairment to the whole body. This impairment reflects claimant's two surgeries including a posterior lumbar interbody fusion. Claimant's right to future medical benefits and to review and modification of that award were preserved. At the time the claim was initially settled, claimant's treating physician assigned general working restrictions that limited claimant's to light-medium physical demand level as defined by the *Dictionary of Occupational Titles*.¹ He was allowed to frequently lift up to 15 pounds and only occasionally lifting of 20-35 pounds.

¹ S.H. Trans. (Oct. 4, 2004) at 13 (Dr. MacMillan's July 27, 2004 report attached as an exhibit).

There were alternative restrictions offered by Dr. Koprivica, a physician claimant asked to examine him in May 2004 for purposes of a rating. Dr. Koprivica indicated claimant should avoid squatting, crawling, kneeling or climbing activities, except on an occasional basis. He also advised against bending at the waist, pushing, pulling or twisting.²

Claimant continued to work for respondent in an accommodated position removing and installing flashing on the roofs. Claimant continued to complain of low back and leg pain and eventually sought additional medical treatment. In early 2006, Dr. MacMillan considered the prospect of implanting a dorsal column stimulator as a means of decreasing claimant's leg complaints. Following a successful trial of the device, the stimulator was implanted on April 18, 2006. At the follow up visit, Dr. MacMillan reported that the device was working well and claimant had stopped taking pain medication.

After a period of healing, claimant returned to work and was to work only light physical demand activities. He was assigned to the shop area and according to claimant, he experienced an increase of low back pain as well as leg pain which he attributed to the need to bend, twist, lift and carry while working in the shop. Jeff Hoffmeier, respondent's operations manager, indicated that claimant's duties in the shop consisted of sweeping, and inventorying the materials. Claimant also testified that he was doing small engine repair. Claimant's supervisor seemed to believe that claimant may have been asked to change oil in the small engines, but did nothing more than sweeping and cleaning tasks.

During this time, both parties agree claimant began to miss work. Claimant explained that there were times his back simply hurt too much to remain at work. Unfortunately, the record is rather sparse on this issue but the record does show there was a period of work hardening. Mr. Hoffmeier testified that once claimant was released to return to work he would work only sporadically. Mr. Hoffmeier testified that on those days claimant would show back up to work, he would ask claimant where he had been. Mr. Hoffmeier indicated that claimant never offered any clear explanation, nor did he indicate that the pain in his back was keeping him from working. Claimant's last day of work was July 26, 2006 and he was ultimately terminated on August 16, 2006.

Claimant returned to see Dr. MacMillan during this same period of time complaining of increased pain, yet according to Dr. MacMillan, he was not taking his pain medications. Ultimately, claimant's pain medication, Methadone, was increased, but there is some suggestion in the file that claimant did not want to take Methadone.

Claimant also testified that Mr. Hoffmeier, through Amalio, a supervisor who translated, told him that there was no more light duty work available and that claimant would have to go back to working on roofs. Mr. Hoffmeier denies this conversation took place and reaffirmed that the job claimant held before being terminated was at all times

² *Id.* at 24 (Dr. Koprivica's May 14, 2004 report attached as an exhibit).

available to him had he not been terminated for his failure to regularly appear for work. Mr. Hoffmeier also indicated that claimant had told him he was restricted from going up on ladders. Amalio did not testify but Mr. Hoffmeier confirmed that Amalio was used to translate when speaking to claimant.

In October 2006, approximately two months after his termination, claimant was again seen by Dr. MacMillan. At this visit, claimant asked for and received an additional restriction limiting his ability to climb ladders. Dr. MacMillan restricted claimant to no repetitive or extended periods of ladder climbing. He explained in his deposition that going up and down the ladder 1-2 times a day was fine, but anything more than that was not appropriate.³ *This is the first time that any of the physicians restricted claimant from climbing ladders in any way.* Dr. MacMillan also confirmed that the dorsal column stimulator carries with it a manufacturers recommendation that the claimant not drive while the device is activated.⁴ Nonetheless, Dr. MacMillan testified that claimant is capable of performing light physical demand jobs. Dr. Bieri was unwilling to say claimant could not work even assuming Dr. MacMillan's restrictions were followed.⁵

Two vocational specialists examined claimant. Michael Dreiling identified 13 tasks while Terry Cordray identified 14 tasks. Although their identification of the tasks was rather similar, their ultimate opinions as to claimant's present employability were vastly different. Terry Cordray, respondent's expert, testified that claimant had the "perfect" opportunity working for respondent and yet he walked away.⁶ He further indicated that claimant has made no efforts to find post-injury employment and has done nothing to enhance his English speaking skills. According to his report, claimant advised Mr. Cordray that his light duty warehouse job with respondent did not provide enough actual work and that accounted for his firing. Mr. Cordray believed the warehouse job was within MacMillan's restrictions as the heaviest thing claimant would have to lift was an 8 pound bucket. In short, he testified that claimant was not permanently and totally disabled and was capable of earning \$7.00 an hour.⁷

In contrast are the opinions of Michael Dreiling who testified that claimant is realistically unemployable. He further testified that given claimant's age (50), his restrictions, ongoing medications, educational background and his history of an accident, the best employment he could hope to achieve would be \$6-8 per hour.

³ MacMillan Depo. at 36.

⁴ *Id.* at 49.

⁵ Bieri Depo. at 25-26.

⁶ Cordray Depo. at 21.

⁷ *Id.* at 30.

When asked to speak to claimant's task loss, Dr. MacMillan testified that claimant lost the ability to perform 5 of the 13 tasks outlined by Mr. Dreiling and 6-7 out of the 14 tasks identified by Mr. Cordray. The variability of this last opinion is owed to the ambiguity of the weights involved and the fact that Dr. MacMillan wasn't sure, based upon the task analysis, precisely how much weight was involved. Dr. Bieri was also asked to consider claimant's task loss and he testified that claimant lost the ability to perform 11 of the 13 tasks identified by Mr. Dreiling.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.⁸

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.⁹ If there is a change in the claimant's work disability, then the award is subject to review and modification.¹⁰

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.¹¹ Our appellate courts have consistently held

⁸ K.S.A. 44-528.

⁹ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

¹⁰ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

¹¹ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.¹²

Here, claimant does not allege an increase in his functional impairment. Rather, claimant alleged his condition changed by virtue of his increased pain complaints and the implantation of the dorsal column stimulator and that due to those changes and his ongoing pain complaints, he can no longer work. Claimant maintains he was told his light duty warehouse job was coming to an end and that he would be forced to return to working on roofs, a job that is precluded by Dr. MacMillan's restrictions. Given claimant's work history, his present restrictions and his physical condition, he argued to the ALJ that he was permanently and totally disabled pursuant to K.S.A. 44-510c. In the alternative, he contends he is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a).

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*¹³, held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

The ALJ concluded claimant was not permanently and totally disabled. He noted that both physicians testified claimant was capable of performing *some* jobs within Dr. MacMillan's restrictions. Michael Dreiling, claimant's expert, indicated only that under Dr. Bieri's sedentary to light work restrictions, claimant "could be" essentially and realistically unemployable.¹⁴ Given this evidence, the ALJ believed claimant had failed to meet his burden of proof on this issue.

The Board has carefully considered the evidence and concludes the ALJ's finding on the issue of permanent total disability should be affirmed. While it is true that claimant bears a significant barrier to his employment efforts due to his lack of English language skills and his educational background, we find it difficult to find that he is permanently and totally disabled under these facts and circumstances. No physician has declared him to be permanently and totally disabled. The strongest opinion from the vocational experts is

¹² See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

¹³ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

¹⁴ Dreiling Depo. at 14.

that claimant “could be” essentially and realistically unemployable. Based on this record claimant retains the ability to perform at least light sedentary work earning \$6.00-8.00 per hour. The strongest evidence to support claimant’s claim is his present lack of employment and the fact that he is receiving Social Security Disability. Neither of these indicia is sufficient here. Claimant is not permanently and totally disabled under K.S.A. 44-510c.

Having concluded that claimant is not permanently and totally disabled, we must now consider whether ALJ appropriately awarded a permanent partial general (work) disability. When an injury does not render a claimant permanently and totally disabled but nonetheless does not fit within the schedule of injuries contained within K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*¹⁵ and *Copeland*.¹⁶ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of

¹⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.¹⁷

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to *continue* their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.¹⁸ Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.¹⁹

The Appellate Courts have also found that when an employer provides evidence establishing the mere prospect for accommodated employment, then the wage available in that accommodated employment will be imputed for purposes of determining a claimant's work disability. In *Mahan*²⁰, the employer offered evidence that it had, in the past, accommodated permanent restrictions for certain of its injured employees. There was no testimony as to the specific job that was to be made available to Mahan nor any indication as to the duration of that prospective job. The *Mahan* Court found that evidence was sufficient basis to conclude that Mahan would have been accommodated at a comparable wage and thus his recovery limited to his functional impairment. The *Mahan* Court reasoned:

We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself

¹⁷ *Id.* at 320.

¹⁸ See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

¹⁹ *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

²⁰ *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 3d 317, 138 P.3d 790, *rev. denied* 282 Kan. ____ (2006).

eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.

The ALJ concluded claimant was entitled to a work disability as he believed “[c]laimant worked for nearly two years for the respondent after his injury and could no longer continue because of his increased pain, which was exacerbated by his lower back after implant of the dorsal column stimulator.”²² The Board has carefully considered the evidence contained within the entire record and concludes this finding of the ALJ should be reversed.

After his initial injury and achieving maximum medical improvement, claimant returned to work in an accommodated position. He was able to perform that job for nearly two years, regularly reporting to work and performing all that was asked of him. When his pain increased he sought treatment from Dr. MacMillan and was ultimately provided with a dorsal column stimulator. At that point, events began to go awry.

Claimant stopped going to work on a regular basis. While his explanation was an increase in pain, the medical records do not consistently support this contention. When he would see Dr. MacMillan he would indicate that he was not taking his pain medication. There is some suggestion that he did not want to take Methadone, but the reason for that is missing from the record. Mr. Hoffmeier inquired of claimant as to why he was failing to appear for work and claimant apparently never attributed his absences to his back injury. Mr. Hoffmeier testified that he got no explanation.

More importantly, the uncontroverted evidence is that respondent always stood willing to accommodate claimant and his restrictions, whether those restrictions included climbing on a ladder or kept him in the warehouse. Claimant may have thought that the warehouse job was no longer going to be made available to him, but the evidence strongly suggests otherwise. Mr. Hoffmeier testified that that position remains viable and still must be done. The bottom line is respondent was always willing to accommodate claimant’s restrictions and to pay him a comparable wage in that position. Under the *Mahan* rationale, we are forced to conclude claimant is limited to his functional impairment, which the parties have agreed, remains at 25 percent.

The claimant has failed in his burden to establish that he is entitled to any benefits beyond his 25 percent functional impairment as the evidence establishes that he demonstrated a lack of good faith in voluntarily abandoning his accommodated position with respondent. The ALJ’s Award is reversed and claimant is denied any work disability.

²¹ *Id.* at 792-793.

²² ALJ Award (Jan. 23, 2009) at 7.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Brad E. Avery dated January 23, 2009, is affirmed in part and reversed in part and claimant is denied modification of the original award.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge